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No. 91-1738

In The

Supreme Court of the United States

October Term, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the Seventh Circuit rely on a new rule of law that came into effect after August 3, 1987, when it ruled that Kevin Taylor's right to due process of law was violated when he was convicted of murder by a jury that had been given instructions that had the likely effect of mistakenly informing the jury to disregard Taylor's defense?

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Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 **Ind. L. Rev.** 713 (1976) 23

Frank Easterbrook, *Substance and* [illegible] *Process*, 1982 **Sup. Ct. Rev.** 85 44

James B. Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 **Chi.-Kent L. Rev.** 23 (1982) 25

Timothy P. O'Neill, *"With Malice Toward None": A Solution to an Illinois Homicide Quandary*, 32 **DePaul L. Rev.** 107 (1983) 19

Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, **Supreme Court Practice** (6th ed. 1986) 8

COUNTERSTATEMENT OF THE CASE

I. The Events

Kevin Taylor first came into contact with Scott Siniscalchi in November 1984, when Taylor discovered his wife and Scott Siniscalchi kissing and embracing in a parked car at 2:00 a.m. J.A. 26-27, 58. Kevin Taylor approached the car and knocked on the windshield, at which time Siniscalchi put the car in gear and dragged Taylor down the road at a high rate of speed. J.A. 58. Taylor suffered multiple injuries, including a broken left hand. *Id.*

Shortly after this incident, Joyce Taylor moved out of the home she had shared with her husband, leaving their two-year-old daughter, Katy, with Kevin. J.A. 59. Joyce soon moved back in with Kevin, but the reconciliation did not last long and in early December, she once again left Kevin and Katy. J.A. 26, 59. One month later, Joyce arrived at the family's home with a sheriff and took away her belongings and Katy. J.A. 60. Kevin was distraught over losing his family and in a conversation with Joyce on January 15, 1985, he threatened to kill himself as well as Joyce, her boyfriend, and Katy. J.A. 25, 45.

In April 1985, Kevin and Joyce Taylor were divorced. Kevin was given visitation rights on all weekends, birthdays and holidays. J.A. 61. Kevin's time with his daughter Katy was an exceptionally significant part of his life; he was very close to Katy and took her everywhere he could. J.A. 53. These visitations, however, put Kevin into rather frequent contact with Scott Siniscalchi, as Joyce often arranged to have Scott drop off Katy at Kevin's home. J.A. 64-65. On some of these occasions, Kevin and Scott had heated words, but Kevin never struck Scott nor otherwise took violent action. J.A. 65-66. The bad blood between the two never subsided, though. In August 1985, while both Kevin and Scott were working at the Illinois

State Fair, Scott made it a practice to point at Kevin, laugh at him, and make obscene gestures toward Kevin. J.A. 69. Kevin suffered this embarrassment in silence. *Id.*

Kevin Taylor was scheduled to spend the day with his daughter on Saturday, September 14, 1985. The weekend was particularly important to Kevin as he was celebrating his birthday and had made plans to take Katy swimming on Saturday morning. J.A. 54-55, 70, 76. Kevin spent Friday night socializing with two couples from his neighborhood. When he left that gathering at around 1:00 a.m., Kevin was, by all accounts, in an excellent mood. J.A. 53-57, 71. As soon as he arrived home, Kevin called Joyce in order to arrange his visit with Katy for the next morning. J.A. 72. (This was not unusual. Kevin often called Joyce late at night, as she frequently worked the late shift and did not get home until 1:00 a.m. *Id.*) Joyce and Kevin discussed a number of subjects during their conversation, including her relationship with Scott Siniscalchi. J.A. 33-35. The two agreed that Joyce would drop Katy off at Kevin's home on Saturday morning. J.A. 73. According to both Joyce and Kevin, the conversation was "civil and polite" and Kevin sounded "happy" to Joyce. J.A. 35. The conversation lasted long enough to prompt Scott Siniscalchi to ask Joyce why she had been on the phone so long. J.A. 37.

Just a few minutes after hanging up with Joyce, Kevin remembered that he was planning to take Katy swimming the next morning and that he needed to be with her earlier than the time he and Joyce had arranged. J.A. 73. Kevin called Joyce again, but this time Scott Siniscalchi answered the phone. Scott refused to let Kevin talk to Joyce, and refused to be of any help in ensuring that Kevin could get Katy in the morning. *Id.* Kevin told Scott: "Well, why don't I just come over there right now and get her out of your hair? That way you and Joyce can

have some time together." J.A. 77. Scott responded by saying: "Well, suit yourself, but you're not going to get her." *Id.* Scott then slammed the phone down. *Id.*

Kevin got in his car and drove to the apartment where Katy lived with Joyce and Scott. He testified that "I wanted to get to my ex-wife's house as soon as possible to get my daughter." *Id.* As he arrived at the house, Kevin remembered that he had been beaten a few months earlier – a beating he suspected Scott of having arranged. Kevin decided, therefore, to bring his hunting knife from his car in with him. He placed it in a sheath in his pants. J.A. 66, 78-79. Kevin testified that all he was thinking about was "[j]ust getting my daughter. That was the only thing that was on my mind was getting my daughter and going home." J.A. 79.

When Kevin reached the apartment he banged once on the door. J.A. 80. He could hear his daughter crying but no one answered. After Kevin banged once again and received no response, he kicked the door open. *Id.* Kevin followed his daughter's cries into the apartment's bedroom where he found Katy in her makeshift bed – a pallet that was on the floor next to the bed in which Scott and Joyce were together. *Id.* This was the first time Kevin had ever seen his daughter's paltry sleeping arrangements or the proximity of her pallet to the bed that his ex-wife and her boyfriend shared. J.A. 38.

According to Kevin Taylor's testimony, when he entered the room "I looked at and told them that I didn't want no trouble; I just wanted my daughter." J.A. 80. Kevin had nothing in his hands at that moment. *Id.* As soon as Kevin reached down to pick up his daughter, though, "Scott started to roll out of bed and looked like he was reaching for something – I don't know – but that's when I jumped on him." J.A. 81. Kevin testified that a

fight ensued in which Joyce was grabbing Kevin's shoulders from behind and "Scott was pulling me forwards, and finally they threw me into the wall and I hit my head, and that's when I grabbed the knife." *Id.* In the course of the struggle (which was violent enough to leave a large hole in the wall of the bedroom, J.A. 23), Kevin stabbed Scott. Although Kevin did not remember speaking with Joyce as he left the house (J.A. 90), Joyce testified that he stopped and told her "I love you." J.A. 40. Scott was pronounced dead by paramedics who arrived at the house. Kevin was arrested later that evening.[1]

II. The Trial

At trial, Taylor admitted that he had stabbed Scott Siniscalchi and had caused his death. J.A. 81. His sole defense was that he was not guilty of murder because he had "acted under a sudden and intense passion resulting from serious provocation by * * * [t]he individual killed." Ill. Rev. Stat. ch. 38, ¶ 9-2(a) (1985). It is undisputed that a showing of sudden and intense passion of this type acts as an affirmative defense to murder and transforms the crime into voluntary manslaughter.[2]

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[1] Because this case turns on Taylor's right to present his defense and to have his defense considered, the evidence relating to that defense is viewed in the light most favorable to the accused. See *People* v. *Larry*, 144 Ill. App. 3d 669, 676, 494 N.E.2d 1212, 1218 (2d Dist. 1986); *People* v. *Carpentier*, 20 Ill. App. 3d 1024, 1027, 314 N.E.2d 647, 649 (3d Dist. 1974). See also *United States* v. *Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984); *United States* v. *Lewis*, 592 F.2d 1282 (5th Cir. 1979). The testimony of Joyce Taylor differed somewhat from that of Kevin. See Petr's Br. 3-5. By all accounts, however, Joyce was not in the room during most of the struggle or the stabbing of Scott Siniscalchi. J.A. 39.

[2] The distinction between murder and voluntary manslaughter in Illinois at the time of Taylor's trial was quite unique. An individual could be convicted of voluntary manslaughter only if the jury found that he was *guilty of all of the elements of murder* but also had one of two affirmative defenses to murder (sudden and intense passion or unreasonable self-defense). See *People* v. *Wright*, 111 Ill. 2d 18, 27-29, 488 N.E.2d 973, 978 (1986). This scheme was changed, effective July 1, 1987; what was previously "murder" is now "first degree murder," and what was previously "voluntary manslaughter" is now "second degree murder." Pet. App. 4 n.1.

The trial judge found that sufficient evidence in support of the defense had been presented to require an instruction on Taylor's theory of defense – that he acted under sudden and intense passion resulting from serious provocation.[3] J.A. 96 ("The Court's going to let the Jury decide * * * whether that provocation existed here or did not."). See also J.A. 101 (reiterating this holding). The question of sudden and intense passion was, therefore, the one and only disputed factual issue that Taylor's jury had to decide.

Although the trial court had ruled that Taylor was entitled to have the jury consider his affirmative defense, the murder instructions that the judge delivered never mentioned the defense. Instead, they simply instructed the jury that Kevin Taylor was guilty of murder so long as the elements of that crime were proven. Nowhere in the course of the murder charge was there any mention of the affirmative defense that Taylor was relying upon. See J.A. 128-129. Rather, after telling the jury about the elements of murder, the judge stated: "If you find from your consideration of all the evidence that each one of these

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[3] This ruling has never been challenged on appeal and represents the definitive statement of Illinois law on Taylor's entitlement to have this defense considered. A series of Illinois precedents confirm the trial court's ruling on this point. See J.A. 94-95.

propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty." J.A. 129.

Later, the court turned to the voluntary manslaughter charge, instructing the jury that a person is guilty of voluntary manslaughter when he has killed an individual while possessing the requisite state of mind, and at "the time of the killing acts under a sudden and intense passion resulting from serious provocation by the deceased. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." J.A. 129-130.

Finally, the trial court gave the following instruction in an attempt to apprise the jury of the relation between the murder and the voluntary manslaughter charge:

> As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses.

J.A. 131.

The prosecutor himself recognized that these instructions failed to inform the jury of the relationship between the offenses of murder and manslaughter. The prosecutor suggested, based on a then-recent decision of the Illinois Appellate Court,[4] that the judge include an instruction explaining how Taylor's sudden and intense passion claim could serve to constitute a complete defense to the murder charge. The prosecutor made this proposal because he did not "want to knowingly create error here." J.A. 101. In denying the prosecutor's request, the trial judge responded that "we're not doing it knowingly; we're doing it out of ignorance." *Id.*

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[4] *People* v. *Bolden*, 132 Ill. App. 3d 1047, 477 N.E.2d 1380 (4th Dist.), appeal denied, 108 Ill. 2d 574 (1985).

After brief deliberations, the jury announced that it had found Kevin Taylor guilty of murder and returned a signed verdict form on that charge. The jury never mentioned the voluntary manslaughter charge, however, and returned unsigned both the guilty and not-guilty forms for that offense. J.A. 131, 135-140.

The trial court sentenced Kevin Taylor to thirty-five years in prison on the murder conviction. J.A. 133. In rejecting the State's request for an enhanced penalty, the trial judge commented on the tragedy that had occurred and the extent to which Kevin Taylor was something other than a cold-blooded murderer: "I never did understand Joyce Taylor throughout this case. Knowing that her ex-husband had emotional problems, she didn't even take the time to deliver her child herself to him for visitation, sent her with the boyfriend. If anybody can ever explain that to me, they'll have to write another report." J.A. 133.

III. The Appeal and the Post-Conviction Proceedings

The Illinois Appellate Court declined to entertain Kevin Taylor's attack on the murder-voluntary manslaughter instructions. The court held that Taylor was not entitled to rely on the prosecutor's request to modify the instructions, and that he had waived the claim by not raising the issue himself at trial. Pet. App. 37-38. The Illinois Supreme Court denied Taylor's petition for leave to appeal on June 4, 1987 (*People* v. *Taylor*, 115 Ill. 2d 549, 511 N.E.2d 436 (1987)), and his conviction became final on August 3, 1987, the date that his time for filing a petition for certiorari expired.[5]

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[5] Under the rules in effect in 1987, a criminal defendant had 60 days to file a petition for certiorari. Conceivably, though,

Taylor then brought a petition for post-conviction relief, arguing that his trial counsel had been ineffective in not joining with the prosecutor in urging a change in the murder-voluntary manslaughter instructions. Shortly after the trial court dismissed this post-conviction action, the Illinois Supreme Court issued its decision in *People* v. *Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), holding that the giving of similar murder-voluntary manslaughter instructions constitutes "grave error," and requires reversal of convictions obtained under these instructions, whether or not the defendant had objected at trial. Part of the Illinois Supreme Court's reasoning was that "the murder instruction makes no mention of the mitigating mental conditions" and that the jury was, therefore, instructed to find the defendant guilty of murder even if one of the defenses had been proved. *Id.* at 194, 526 N.E.2d at 145. The court in *Reddick* considered the flaws in these instructions to be so troubling that it granted relief to one defendant who had not even raised the issue on appeal. See *id.* at 199, 526 N.E.2d at 147 (1988).[6]

On appeal from the denial of his post-conviction relief, Taylor argued that *Reddick* was controlling, particularly on the point that "this type of murder instruction 'essentially insure(s) that, if the jury follows them, the

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Taylor could have brought his case as an appeal under 28 U.S.C. § 1257(2) (1987), which would have extended the time limit to 90 days. See Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, **Supreme Court Practice** 301-302 (6th ed. 1986). Defining the precise date on which Taylor's conviction became final is unnecessary here because Taylor seeks the benefit of no cases decided after the date of his actual trial. See Pet. App. 5 n.2.

[6] Given this holding, the State has wisely chosen not to argue that Taylor waived his attack on the instructions by not asserting it at trial. See Pet. App. 17 n.5 (concluding that State has "waived waiver").

jury cannot possibly convict a defendant of voluntary manslaughter' " because the jury will always convict of murder. Brief and Argument of Defendant-Appellant, No. 4-88-0075, at p. 11 (quoting *Reddick*). The Appellate Court rejected Taylor's reliance on *Reddick*, however, holding that even though the *Reddick* court described the giving of these instructions as "grave" and non-waivable error, the error was not of constitutional magnitude and accordingly could not be the basis of post-conviction relief.[7] Pet. App. 41. The Illinois Supreme Court denied Taylor's petition for leave to appeal on October 5, 1989. *People* v. *Taylor*, 127 Ill. 2d 637, 545 N.E.2d 127 (1989).

IV. The Federal Habeas Corpus Proceedings

Taylor then filed a habeas corpus action in the United States District Court for the Central District of Illinois. He asserted "that his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment" had been violated because the instructions "left the jury unable to recognize the defendant's affirmative defense." Mem. in Support of Pet. 2. He explained that one of the constitutional flaws in the instructions was that they " 'deprived [petitioner] of [his] affirmative defenses entirely: if the jury found [petitioner] killed * * * then it had to convict [him] of murder regardless of whether [he] acted under serious provocation.' " *Id.* at 7 (quoting *United States ex rel. Falconer* v. *Lane*, 720 F. Supp. 631, 643 (N.D. Ill. 1989)).

The District Court began its analysis of this claim by noting that "[t]he state concedes that, under the current

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[7] Illinois courts have held that the Illinois Post-Conviction Relief Act may be used only to redress the denial of a constitutional right. See *People* v. *Shaw*, 49 Ill. 2d 309, 311, 273 N.E.2d 816, 817 (1971).

state of the law, the jury instructions used in Taylor's trial amount to a due process violation." Pet. App. 29. The court explained that in *Falconer* v. *Lane*, 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit had held that "such jury instructions on murder and voluntary manslaughter, when read together as they were at Taylor's trial, erroneously permit a jury to convict a defendant of murder even where it finds the presence of one or more mitigating circumstances" that qualify as defenses to murder. Pet. App. 29. Nonetheless, the court ruled that *Teague* v. *Lane*, 489 U.S. 288 (1989), barred habeas corpus relief because Taylor was invoking a "new rule" that had not been settled in August 1987, when his conviction became final. Pet. App. 32. The District Court reasoned that even though Taylor's claim broke no doctrinal ground, the rule that Taylor sought to invoke constituted a new rule because it had not been applied "to the specific situation" of the Illinois murder and voluntary manslaughter instructions by the time Taylor's conviction became final. Pet. App. 31 (citation omitted).

The Seventh Circuit reversed in an opinion written by Judge Flaum and joined by Judges Posner and Manion. Pet. App. 1-24. The court held that a decision does not constitute a "new rule" simply because it represents the first time that an established doctrine has been applied to the precise factual situation – in this case, Illinois' murder-voluntary manslaughter instructions. Rather, the court explained, the *Teague* inquiry requires an examination of the state of the law at the time the petitioner's conviction became final and a determination as to whether the law in effect at that time can be said to compel the result that the habeas petitioner is seeking. Specifically, the court announced (Pet. App. 12):

> First, we determine whether the case clearly falls in one category or another – if it overrules or significantly departs from precedent, or

> decides a question previously reserved, it is a new rule, while if it applies a prior decision almost directly on point to a closely analogous set of facts, it is not. Second, when the question is a close one, we will look to (1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of the factual context in which that precedent arose.

Applying these standards to this case, the court first ruled that the result that Taylor advocated (and that the Seventh Circuit had reached earlier in *Falconer*) did not depart, in any way, from any of the Seventh Circuit's previous precedents. Pet. App. 17-18. The court then found that the result Taylor sought did not depart from the holdings of any lower federal courts or state courts, as no court had ever held that these instructions were constitutionally adequate. *Id.* at 18-19. Given these conclusions, the court then examined the precedents that required the invalidation of the instructions. The court concluded that the pre-existing law governing the due process rights of a defendant to fair instructions informing the jury of the relevant factual issues to be decided was more than specific enough to compel the invalidation of the Illinois murder-voluntary manslaughter instructions in the context of this case. *Id.* at 20-23.

SUMMARY OF ARGUMENT

In deciding that Kevin Taylor was entitled to habeas corpus relief, the Seventh Circuit relied exclusively on legal rules that were well-settled when Kevin Taylor's conviction became final. The court's conclusion that Taylor's due process rights were violated by a procedure that arbitrarily stripped him of his right to present his lone defense did not even minimally advance existing law.

It is undisputed that Kevin Taylor was entitled to an instruction on the theory of his defense in this case and that he was entitled to a jury determination on whether, in light of that defense, he was guilty of murder. Taylor was not guilty of murder if he acted under sudden and intense passion as a result of serious provocation. This was Taylor's lone defense; he acknowledged that he killed Scott Siniscalchi but asked the jury to find that he did so acting under sudden and intense passion. The trial judge ruled that the evidence in support of this defense was strong enough to require an instruction to the jury about Taylor's theory of defense to the murder charge. This ruling stands as the authoritative construction of Illinois law on this point.

It is also undisputed that the instructions that Taylor's jury received completely failed to apprise the jury that it should find Kevin Taylor not guilty of murder if it found that he acted under sudden and intense passion. Quite to the contrary, the murder instructions explicitly told the jury that if it found the elements of murder to exist, it should find Kevin Taylor guilty. The State fully concedes that these instructions arbitrarily deprived Taylor of his right to have his defense considered. The Seventh Circuit also agreed, concluding that the instructions were likely to have led the jury to ignore Taylor's defense.

Both of these points are accepted by everyone in this case. The only question under *Teague*, therefore, is whether the Seventh Circuit relied on a new rule of law when it held that Taylor's due process rights were violated by a trial in which he was arbitrarily deprived of his right to have his factually supported defense considered. The answer to this question is obvious. As the Seventh Circuit readily concluded, a defendant's right to have his side of the case considered by the trier of fact is hardly a

new right; it has been recognized in a long series of cases involving the due process rights of criminal defendants.

The State acknowledges the ancient pedigree of the constitutional rule forbidding jury instructions to arbitrarily withdraw dispositive factual issues from consideration by the trier of fact. Nonetheless, the State argues that this rule applies only to instructions that affect *elements* of an offense and has no effect at all on *affirmative defenses*. According to the State, the Due Process Clause is not implicated here – no matter how unfairly and arbitrarily Taylor was stripped of his right to defend himself – because the deprivation only affected Taylor's right to have his affirmative defense considered. This argument is entirely without merit. The right to due process of law has never been held to turn on whether the gross unfairness in a proceeding relates to an element of an offense rather than an affirmative defense. A raft of holdings are to the contrary. It is, of course, true that this Court has held that the Due Process Clause does not require that a state prove the absence of affirmative defenses *beyond a reasonable doubt*. The point of those cases, however, is that the dictates of due process are *satisfied* without *that* specific requirement being applied to affirmative defenses. Those cases do not even remotely stand for the State's unprecedented contention that a state's adjudication of affirmative defenses is *immune* from due process scrutiny.

ARGUMENT

I. THE SEVENTH CIRCUIT RELIED ON NO NEW RULES IN HOLDING THAT KEVIN TAYLOR WAS ENTITLED TO HABEAS CORPUS RELIEF.

Since *Teague* v. *Lane* was decided, this Court has invoked several different verbal formulations in analyzing what constitutes a "new" rule of law. See *Teague*, 489 U.S. at 301 (a rule is new if it "breaks new ground or

imposes a new obligation on the States" or, put another way, was not "dictated by precedent existing at the time the defendant's conviction became final"); *Penry* v. *Lynaugh*, 492 U.S. 302, 315 (1989) (rule petitioner invoked was not new as petitioner was only asking "to fulfill the assurance upon which" earlier cases were based); *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990) (rule was new when it was "susceptible to debate among reasonable minds"); *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (task is to determine whether a state court considering claim at the time conviction became final "would have felt compelled by existing precedent to conclude that the rule" now invoked was required by the Constitution); *Stringer* v. *Black*, 112 S. Ct. 1130, 1140 (1992) (whether rule is dictated by precedent is an "objective" inquiry not to be governed by whether all lower courts agree). See also *Wright* v. *West*, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring) (if a "proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful"); *id.* at 2499 (Kennedy, J., concurring) (when the "rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule"). Affirming the Seventh Circuit's judgment does not depend on choosing among any of these arguably differing standards, however, because the rules that compel granting Taylor habeas corpus relief are not "new" under any of these formulations.

This case is certainly the easiest *Teague* case this Court has considered and the reason for this is relatively straightforward. This is simply an instance of a lower federal court dutifully applying settled principles of law.

There is, therefore, a significant difference between this case and each of the post-*Teague* cases that have been before this Court. Each of those cases involved a habeas petitioner who relied upon some decision of this Court that was decided after his conviction became final. Not too surprisingly, the Court has often concluded that the intervening Supreme Court decision upon which the petitioner relied constituted a "new rule" and the Court has refused to apply it retroactively.

The reason this conclusion is not overly surprising relates to the nature of this Court's certiorari jurisdiction and the manner in which this Court decides cases. Most of this Court's cases call on the Court to decide rather stark legal questions on particularly debatable points of law, as opposed to more factbound applications of accepted legal principles such as those that dominate the lower courts' dockets. See generally United States Supreme Court Rule 10.1 (outlining criteria for granting certiorari). Moreover, unlike lower courts which seek primarily to apply this Court's settled precedents faithfully, this Court's function calls on it to make more momentous decisions as to new directions that constitutional interpretation should take and to create new rules with some degree of frequency. It is not surprising, then, that the Court often finds that one of its own past decisions interpreting the Constitution created a new rule of law.

This case is on dramatically different footing, though, and there is no reason to approach it with even a slight presumption that Taylor is relying on any new rule of law. Taylor relies on no decisions or legal principles other than those that were firmly in place at the time of his trial. Those principles clearly compel the relief that he seeks and the relief to which the Seventh Circuit ruled he was entitled.

A. It Is Undisputed That The Instructions Were Likely To Have Been Understood As Foreclosing Jury Consideration Of Kevin Taylor's Defense To The Murder Charge.

The jury that convicted Kevin Taylor of murder did so on the basis of instructions that were plainly inaccurate and that thoroughly stripped him of the opportunity to have his defense to murder considered. Taylor was not guilty of murder if he "acted under a sudden and intense passion resulting from serious provocation by * * * [t]he individual killed." Ill. Rev. Stat. ch. 38, ¶ 9-2(a) (1985). This was Taylor's defense. He conceded that he killed Scott Siniscalchi and asked the jury to find that he acted under sudden and intense passion and was therefore not guilty of murder. J.A. 112-121. The trial judge found that Kevin Taylor presented sufficient evidence of sudden and intense passion to require a jury instruction on the theory of his affirmative defense. Hence, the trial judge ruled that he had "to let the Jury decide * * * whether that provocation existed here or did not exist here." J.A. 96. Yet, the instructions that were then given utterly failed to inform the jury that it should find Kevin Taylor not guilty of murder if it concluded that he acted under sudden and intense passion. Indeed, the instructions actually gave the jury the opposite directive – that Kevin Taylor was guilty of murder *even if* he acted under sudden and intense passion.

No one debates these points. To begin with, the State concedes that the instructions "permitt[ed] the jury to find Taylor guilty of murder without considering his affirmative defense." Petr's Br. 12. This concession is consistent with the observations of a unanimous Illinois Supreme Court in *People* v. *Reddick*, 123 Ill. 2d 184, 194, 526 N.E.2d 141, 145 (1988), in which that court explained that one of the flaws in these instructions is that "the

murder instruction makes no mention of the mitigating mental conditions" that act as affirmative defenses to the charge of murder. Therefore, the court continued, "[t]hese instructions *essentially assure*" that the jury will not be able to acquit a defendant of murder, even if one of the defenses to murder is clearly demonstrated. *Id.* (emphasis added).

Similarly, in *Falconer* v. *Lane*, 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit explained that the murder instructions "read as though" there was no affirmative defense to the murder charge. "No matter how clearly either the State or the defense proved the existence of the mitigating 'manslaughter defenses,' the jury could nevertheless return a murder verdict in line with the murder instruction as given." *Id.* at 1136.

This is not, then, a case about slightly ambiguous instructions that create a slim chance of being interpreted in the manner that the defendant suggests. Quite to the contrary, the instructions were rather clear in telling the jury to ignore Kevin Taylor's defense and to convict him of murder even if he acted under sudden and intense passion. The jury was told that if it found that the State proved the specified elements of murder it must return a verdict of guilty on that charge. And the jury did just that, in complete conformance with the instructions it was given. In light of these instructions and in light of Taylor's own acknowledgment that he was guilty of the *elements* of murder, it is difficult to imagine how a jury possibly could have found him not guilty of murder – even if it was fully convinced that he was acting under sudden and intense passion. As Judge Easterbrook has noted: the instructions at issue here "tell a jury precisely what to do." The problem, of course, is that "they tell the jury the *wrong* thing to do," for a defendant has the right to have his affirmative defenses considered. *Flowers* v.

Illinois Dep't of Corrections, 962 F.2d 703, 709-710 (7th Cir. 1992) (Easterbrook, J., concurring), pet. for cert. filed, 61 U.S.L.W. 3150 (U.S. Aug. 5, 1992) (No. 92-253).

Indeed, the verdict forms that the jury returned confirm that the jury never considered the voluntary manslaughter charge and, hence, never considered Taylor's defense to murder. The jury signed neither the "guilty" nor the "not guilty" form on the voluntary manslaughter charge. See J.A. 135-140 (reproducing forms). This reaction was consistent with the charge which told the jury that it should not return guilty verdicts on both the murder and voluntary manslaughter charges. Once the jury found that Taylor was guilty of the elements of murder – as he concededly was – the jury had no reason to go further. See generally *Flowers*, 962 F.2d 703 (reviewing instructions nearly identical to those here).[8]

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[8] *Flowers* clearly illustrates the extent to which these instructions served to foreclose the jury from considering defenses to murder. The jury in *Flowers* had been given murder-voluntary manslaughter instructions virtually identical to the ones Kevin Taylor's jury heard, except that the jury had not been told that it must not find Flowers guilty of both murder and voluntary manslaughter. Obviously convinced that the facts supporting Flowers' affirmative defense had been proven, the jury returned a guilty verdict on the voluntary manslaughter charge (representing a finding that the elements of murder had been proven but that an affirmative defense also had been proven). Because of the nature of the instructions, however, the jury also returned a guilty verdict on the murder charge. This, of course, was an entirely predictable result because the instructions never explained that proof of sudden and intense passion constituted an affirmative defense to murder and entitled the defendant to a not-guilty verdict on the murder charge. The judge who received these remarkable, obviously inconsistent, verdicts instructed the jury to deliberate further and to return a guilty verdict on either the murder or voluntary manslaughter charge, but not both. (This instruction was similar to the one that Taylor's jury received. J.A. 131). Following this instruction, the jury came back with a murder verdict – even though it had unquestionably already found the presence of an affirmative defense that should have led to an acquittal as to the murder charge.

Flowers is just one of many cases where these instructions led juries to ignore completely an affirmative defense that should have been dispositive. See generally Timothy P. O'Neill, *"With Malice Toward None": A Solution to an Illinois Homicide Quandary*, 32 **DePaul L. Rev.** 107, 118-126 (1983) (discussing other similar cases including one in which the judge tried to clarify the issues for the jurors by telling them that if they find the defendant "guilty of murder, then you don't have to consider the voluntary manslaughter because you have already found her guilty of murder").

The Seventh Circuit's conclusion in *Falconer*, which the court followed here, is compelling: "This is not a case in which the instructions may be described as falling just short of some ideal formulation, or as flawed only if viewed in 'artificial isolation.' They specifically directed the jury that it could return a verdict of murder * * * without making any reference to evidence regarding provocation." 905 F.2d at 1137.

There was certainly nothing "new" about the Seventh Circuit's methodology in reaching this conclusion about the natural import of these instructions. The Seventh Circuit did cite a 1990 decision – *Boyde* v. *California*, 494 U.S. 370, 380 (1990) – for the proposition that it is appropriate for a court to consider " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in' an invalid manner." Pet. App. 21. The citation of *Boyde* was not at all critical to the court's reading of the instructions, however. Rather, the instructions in this case so clearly informed the jury to ignore

Taylor's defense that the court's conclusion was compelled under any of the formulations that this Court has articulated.

Indeed, the *Boyde* "reasonable likelihood" standard that the Seventh Circuit drew from was actually far more sympathetic to the prosecution than any standard the court would have applied had it chosen to cite some of this Court's pre-1987 cases. See *Boyde*, 494 U.S. at 379-380 (discussing various formulations and concluding that the "reasonable likelihood" standard "better accommodates the concerns of finality and accuracy" than the other standards). Certainly, the most widely accepted standard in 1987 would have been even easier for Taylor to satisfy. See *Francis* v. *Franklin*, 471 U.S. 307, 315-316 (1985) (asking what "a reasonable juror *could have* understood the charge as meaning" (emphasis added)). The State can hardly be heard to complain that the Seventh Circuit invoked the "reasonable likelihood" standard instead of one of the more defendant-protective standards that were current in 1987.[9]

B. The Seventh Circuit Relied On No New Rules In Holding That Instructions Which Arbitrarily Foreclose Jury Consideration Of A Defense Violate The Defendant's Right To Due Process Of Law.

Having recognized that the instructions were likely to have led the jury to ignore Kevin Taylor's defense, the Seventh Circuit proceeded to ask whether "instructions

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[9] Had the Seventh Circuit not used the state-protective standard of *Boyde*, the State almost assuredly would now be arguing that it was entitled to have the benefit of *Boyde*.

permitting a jury to reach a murder verdict without considering evidence that would warrant mitigation to voluntary manslaughter (in accordance with a reasonable interpretation of those instructions) violates due process." Pet. App. 22. The court had no difficulty answering this question. It was manifest to the court that the Due Process Clause does not tolerate instructions that arbitrarily "lead the jury to ignore evidence" that would exonerate the defendant of murder. *Id.* This conclusion is plainly correct and clearly entitles Taylor to relief given the finding of the Illinois trial court that he had presented enough evidence in support of his defense to justify an instruction. It is equally plain, moreover, that the Seventh Circuit was not relying on any new rules of law in reaching this conclusion.

The crux of the Seventh Circuit's holding was that the instructions violated Kevin Taylor's right to due process of law because "the jury could not weigh evidence that may have led to an acquittal on the charge of conviction – regardless of whether the evidence related to an element of the crime or an affirmative defense." Pet. App. 23. Just like the instructions in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), the court explained, the instructions here acted as the equivalent of a conclusive presumption or a directed verdict on a dispositive factual issue that Kevin Taylor had the right to have his jury decide. To be sure, the court added, *Connecticut* v. *Johnson* dealt with elements of an offense, while the impairment in this case dealt with an affirmative defense. Nonetheless, the court explained that given the aspect of *Connecticut* v. *Johnson* it was relying upon, this difference amounts to "an insignificant distinction." Pet. App. 23. The court considered it self-evident that decisions relieving the prosecution of the constitutional duty to disprove the defendant's

affirmative defenses beyond a reasonable doubt[10] do not relieve a trial court of its duty to allow the defendant to present his relevant defenses and to allow the jury to consider those defenses. Thus, the court held that the instructions that were given here – much like the instructions that were given in *Connecticut* v. *Johnson* – unconstitutionally deprived the defendant of his right to have the jury make the factual findings critical to the determination of his guilt or innocence with respect to the murder charge.

The Seventh Circuit did not dwell long on the precise nature of the due process violation, as it evidently considered it indisputable that instructions that arbitrarily preclude a jury from considering essential defenses violate due process of law. Yet, because the State now disputes that proposition, it is necessary at this point to provide more thorough documentation for the Seventh Circuit's basic conclusion and to elaborate on the nature of the due process violation that the court identified. Moreover, in order to refute the State's contention that the Seventh Circuit's decision depends on some new rule of law that emerged only after Taylor's conviction became final, this brief establishes the clarity of the constitutional violations referring exclusively to cases decided prior to August 3, 1987 – the date on which Kevin Taylor's conviction became final. As this analysis reveals, the unconstitutionality of Kevin Taylor's conviction was as obvious on that date as it is today.

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[10] Earlier in its decision, the panel had recognized that the United States Constitution does not require the prosecution to bear the burden of disproving affirmative defenses beyond a reasonable doubt. Pet. App. 12-16.

1. The Due Process Right That Taylor Asserts Was Clearly Established On The Date His Conviction Became Final.

This Court has often stressed the basic constitutional nature of a defendant's right to present a defense. In *In re Oliver*, 333 U.S. 257, 273 (1948), for example, the Court described the right of an individual to "be heard in his defense – a right to his day in court" as one of the most "basic" ingredients of due process of law. In *Washington* v. *Texas*, 388 U.S. 14, 19 (1967), the Court similarly explained that "the right to present a defense" is a "fundamental element of due process of law." This right has been held to include the right to present evidence going to the issue of guilt (see *Chambers* v. *Mississippi*, 410 U.S. 284 (1973)); the right to present evidence relevant to sentencing (*Green* v. *Georgia*, 442 U.S. 95 (1979)); and the right of a defendant to testify in his or her own behalf (see *Rock* v. *Arkansas*, 483 U.S. 44 (1987)). See also *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (discussing constitutional guarantee of a "meaningful opportunity to present a complete defense" and "an opportunity to be heard"). All of these rights are designed to ensure a fair procedure at which the defendant is allowed to present his side of the case – whether his side relates to refuting an element of the offense or to establishing a relevant affirmative defense. See *Webb* v. *Texas*, 409 U.S. 95, 98 (1972) (reversing conviction based on state judge's interference with the defendant's right "to present his own witnesses to establish a defense"). See generally Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 **Ind. L. Rev.** 713 (1976).[11]

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[11] Even in the civil context, the Court has held repeatedly that due process carries with it a basic right "to be heard." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Boddie* v. *Con-*

The right to *present* a defense carries with it, of course, the right to have the trier of fact *consider* the proffered defense. Thus, in *Cool* v. *United States*, 409 U.S. 100 (1972), Marilyn Cool's defense turned on the testimony of one Robert Voyles, her alleged accomplice. At Cool's trial, Voyles testified that he alone was guilty of the crime charged and that Cool had nothing to do with the crime. The trial judge gave the jury an "accomplice instruction" which provided that accomplice testimony is "open to suspicion" but that if the jury is convinced that Voyles's testimony "is true beyond a reasonable doubt, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime." *Id.* at 102. In reversing Cool's conviction, this Court held that this instruction concerning one of the defense witnesses violated, among other rights, the defendant's rights to present evidence as recognized in *Washington* v. *Texas*. The Court explained that the "instruction given below impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable." 409 U.S. at 104.

If the right to present witnesses and a defense was violated in *Cool*, it was violated with a vengeance in this case. In *Cool*, the jury at least was given the opportunity to consider the exculpatory evidence, so long as it found the evidence "extremely reliable." Here, by contrast, the jury was told that Kevin Taylor's evidence of sudden and intense passion – evidence which he presented through his own testimony and that of other defense witnesses –

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necticut, 401 U.S. 371, 380 (1971); *Baldwin* v. *Hale*, 1 Wall. (78 U.S.) 223, 233 (1863). As the Court explained in *Logan*: this right requires "an opportunity • • • granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case." *Logan*, 455 U.S. at 437 (citations omitted).

had no effect on the charge of murder. As the late Professor James Haddad, a member of the Illinois Pattern Jury Instruction Committee from 1974 through 1991 (and Chairman of the Committee for many of those years) wrote: a court delivering the Illinois instructions on murder-voluntary manslaughter "tells the jury, in effect, that the lawyers were wrong in suggesting that proof of murder turns upon what the evidence shows with respect to passion-provocation." James B. Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 **Chi.-Kent L. Rev.** 23, 31 (1982).

It is difficult to imagine a more dramatic impairment of the right to present a defense. It does a defendant no good to have the right to testify and present witnesses that prove a defense, if he has no right to have his trier of fact instructed that the defense exists as a matter of law. The Constitution has not been read to create such pyrrhic rights. "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Washington* v. *Texas*, 388 U.S. at 23. See also *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) (trial court's limiting instructions on mitigation evidence violated defendant's right to present mitigating evidence and to have it considered). As this Court held in *Spurr* v. *United States*, 174 U.S. 728, 735 (1899), when a defendant is "entitled to the full benefit of [a] defense," it is "vital" that the jury be properly instructed. See also *United States* v. *Bailey*, 444 U.S. 394, 415-416 (1980) (discussing right to instruction on theory of defense where evidence supports it); *Hickory* v. *United States*, 160 U.S. 408, 423 (1896) ("When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially."). The Ninth Circuit was, therefore, clearly correct when it observed that "a failure to instruct

the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed • • • will entitle the defendant to a judgment of acquittal." *United States* v. *Escobar de Bright*, 742 F.2d 1196, 1201-1202 (9th Cir. 1984).

There can be no doubt about the constitutional implications of failing to instruct a jury on a defense that is supported by the evidence. This Court has often repeated that the Constitution forbids the entry of a directed verdict against a defendant in a criminal proceeding. *United States* v. *Martin Linen Supply Corp.*, 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947); *Sparf & Hansen* v. *United States*, 156 U.S. 51, 105-106 (1895). Yet, this is almost precisely what happened in this case. Kevin Taylor took the stand and admitted to having killed Scott Siniscalchi. His only defense was that he acted under sudden and intense passion, and the state court ruled that he had presented sufficient evidence to entitle him to a jury determination on that issue. However, the trial court delivered an instruction that told the jury to convict Taylor of murder so long as the elements of the offense were present – whether or not the killing was the result of sudden and intense passion. This instruction had the precise effect of a directed verdict for the prosecution and deprived Kevin Taylor of his right to have a jury make the factual determinations that would resolve whether he was guilty of murder. See generally *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980).[12]

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[12] In *Hicks*, this Court held that the defendant was constitutionally entitled to be sentenced by an Oklahoma jury, even though the Sixth Amendment does not itself require jury sentencing. The Court explained that where

> a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, • • • and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. • • • In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

Hicks, 447 U.S. at 346. Just as in *Hicks*, it is clear that Illinois law provided Kevin Taylor with "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury." *Id.* See Ill. Rev. Stat. ch. 38, ¶ 115-1 (1985). This state-created liberty interest in trial by jury provides yet further support for the due process right that is the predicate for Taylor's habeas corpus relief.

Indeed, long before Kevin Taylor was tried, this Court had found violations of the right to present a defense based on far weaker interferences with a defendant's right to have a jury decide his guilt or innocence. In *Quercia* v. *United States*, 289 U.S. 466 (1933), this Court reversed a conviction because the trial judge had commented on the evidence in a manner which, the Court feared, was likely to preclude the jury from engaging in "a fair and dispassionate consideration of the evidence." *Id.* at 472. See also *Hopt* v. *Utah*, 110 U.S. 574, 583 (1884) ("prisoner had the right to the judgment of the jury upon

the facts, uninfluenced by any direction from the court as to the weight of evidence").

Similarly, this Court often has recognized that instructions which the jury may construe as conclusive presumptions unconstitutionally interfere with a defendant's right to due process of law. See *Connecticut* v. *Johnson*, 460 U.S. 73, 84 (1983) (plurality opinion) (conclusive presumption "is the functional equivalent of a directed verdict on that issue"); *Sandstrom* v. *Montana*, 442 U.S. 510, 523 (1979) (instruction that included presumption "invaded [jury's] factfinding function"); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 446 (1978) (same); *Morissette* v. *United States*, 342 U.S. 246, 274 (1952) ("so long as the functions of the judge and jury are distinct * * * neither can invade the province of the other without destroying the significance of trial by court and jury").[13]

The law has long been clear that the Due Process Clause does not tolerate conclusive presumption instructions that serve to "shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue." *Mobile, J. & K.C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43 (1910). When a statutory scheme makes some factual issue dispositive to

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[13] Because these specific cases (*Johnson*, *Sandstrom*, *United States Gypsum* and *Morissette*) dealt with elements of an offense, the presumptions at issue there violated not only the right to present a defense but also the right to require the prosecution to prove each element of the offense beyond a reasonable doubt. As the Seventh Circuit noted, the right to proof beyond a reasonable doubt is not at issue with respect to Taylor's affirmative defenses. This fact, however, does not erase the impact that these instructions have on other constitutional rights implicated by the jury's constitutional role and the defendant's right to have his case decided on its facts. Pet. App. 23.

the proper resolution of a case – as Illinois law clearly does with respect to the affirmative defense of sudden and intense passion – "the State may not, consistently with due process, eliminate consideration of that factor in its * * * hearing." *Bell* v. *Burson*, 402 U.S. 535, 541 (1971).

Here, the jury was not merely subject to some judicial comment *frowning* upon the defense or to some presumption that *may* have been taken as conclusive; the jury was given an instruction that totally removed the defense from its consideration of the murder charge. The Seventh Circuit broke no new ground in holding that this error was of constitutional magnitude. Its holding followed, *a fortiori*, from many of this Court's and federal courts of appeals' earlier decisions. *Cf. Stringer*, 112 S. Ct. at 1136 (to the extent that the differences between the recent decision and the old law were significant, they suggest that application of the old principle to these facts "follows, *a fortiori*").

It is this very essence of due process – the right to present a relevant defense and have that defense considered – that forms the basis of the federal courts of appeals' recognition that a defendant's right to due process of law may be violated when a state court fails to instruct the jury on a theory of defense that has factual support. For example, in *United States ex rel. Means* v. *Solem*, 646 F.2d 322 (8th Cir. 1980), the state trial court had refused to give the jury an instruction on the defendant's theory of self-defense. In granting habeas corpus relief, the Eighth Circuit explained that *"[i]t is well established* that a defendant in a criminal case is entitled to an instruction on his theory of the case if there is evidence to support it." *Id.* at 328 (emphasis added). When such an instruction is improperly denied, the court explained, a habeas corpus petitioner is entitled to relief if he can demonstrate a "fundamental defect which inherently

results in a complete miscarriage of justice (or) an omission inconsistent with rudimentary demands of fair procedure." *Id.* (citation omitted). In *Means*, the court concluded (much as the Seventh Circuit did in this case) that the "omission of the requested instruction on self-defense and defense of others 'evaluated in light of the totality of the circumstances' so infected the 'entire trial that the resulting conviction violates due process.' " *Id.* at 332 (citations omitted). See also *Escobar de Bright*, 742 F.2d at 1201 ("[t]he right to have the jury instructed as to the defendant's theory of the case is one of those rights * * * basic to a fair trial").

Many other cases from a variety of circuits have applied this rule in assessing whether a state trial court's or a federal district court's refusal to provide an instruction on a critical defense violated a defendant's right to due process of law. See, *e.g*, *United States* v. *Hicks*, 748 F.2d 854, 857-858 (4th Cir. 1984); *United States* v. *Middleton*, 690 F.2d 820, 826 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); *United States ex rel. Peery* v. *Sielaff*, 615 F.2d 402 (7th Cir. 1979), cert. denied, 446 U.S. 940 (1980); *Zemina* v. *Solem*, 573 F.2d 1027 (8th Cir. 1976); *Strauss* v. *United States*, 376 F.2d 416, 418-419 (5th Cir. 1967). As the Fifth Circuit held in *Strauss*:

> It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of the defense for which there is any foundation in the evidence. * * * The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that

> defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge *directs a verdict on that issue against the defendant*.[14] * * * A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge.

376 F.2d at 418-419 (some emphasis added). See also *United States* v. *Hicks*, 748 F.2d at 857-858 ("Once it appeared that there was sufficient alibi evidence to permit the factfinder to pass on the issue, Hicks had a Sixth Amendment and due process right to have that issue submitted to a jury."); *Peery*, 615 F.2d at 404 ("Since the result is trial by the judge, rather than trial by a jury, both Sixth Amendment and Due Process rights may be at issue."); *United States* v. *Blair*, 456 F.2d 514, 520 n.5 (3d Cir. 1972) (where failure to instruct materially implicates the defense's arguments it can "amount to undermining the jury's ability to find for the defense on these points").

Similarly, state courts routinely have recognized that a defendant has a constitutional right to an instruction on a defense theory that has factual support. As the Connecticut Supreme Court has explained: "A fundamental element of due process is the right of a defendant charged with a crime to establish a defense. * * * This fundamental constitutional right includes proper jury instructions on the elements of [the] defense." *State* v. *Miller*, 186 Conn. 654, 660-661, 443 A.2d 906, 909 (1982) (citing *Washington* v. *Texas*). See also, *e.g.*, *Allen* v. *Nevada*, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981); *Naugher* v. *State*, 685 P.2d 37, 41 (Wyo. 1984). The law on this point was well-settled long before 1987.

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[14] This, of course, is the same analogy that this Court drew in *Connecticut* v. *Johnson*, 460 U.S. at 84, which the Seventh Circuit relied upon. Pet. App. 22-23.

Of course, the right to present a relevant defense and to have that defense considered does not entitle a defendant to a defense instruction where there is insufficient evidence to support it. As the Court explained in *United States* v. *Bailey*, 444 U.S. 394, 416 (1980):

> [t]he requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as the judge of credibility. * * * On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses.

In this case, though, the Seventh Circuit was not reviewing a state court determination that a defendant failed to meet a minimum burden of production to justify a defense instruction. Quite to the contrary, the Seventh Circuit was following the finding of the trial judge that Kevin Taylor *had* presented enough evidence to justify the instruction (J.A. 96, 101), and that the dispositive factual issue thus presented could only be resolved by the jury. Pet. App. 24.[15] The problem is that the instructions given utterly failed to apprise the jury of the conclusion that the trial judge had properly reached.

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[15] This case does not, therefore, call into question the level of deference that a federal court should afford to a state court which has determined that no defense instruction is warranted by the evidence. The determination of whether evidence in support of a defense is sufficient to sustain the defense is a matter of state law and it is not typically the province of a federal court to declare that a state court has erred in applying state law. See generally *Bagby* v. *Sowders*, 894 F.2d 792, 794-795 (6th Cir. 1990) (en banc), cert. denied, 496 U.S. 929 (1990).

It is for precisely this reason that the flawed instructions produced more than just infringements of the right to present a defense and to have that defense considered fairly. In addition, the instructions here turned Kevin Taylor's trial into an arbitrary and irrational proceeding in a way that surely violated the Due Process Clause as it has long been understood by this Court. The Court has often proclaimed that "the touchstone of due process is the protection of the individual against arbitrary action of government." *Ponte* v. *Real*, 471 U.S. 491, 495 (1985) (citations omitted). See also *Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979) (the "most elemental of Due Process rights" is the "freedom from a wholly arbitrary deprivation of liberty"). In this case the trial judge, at one moment, held that the defendant was entitled to have the jury consider his defense to murder. Then, at the next moment, the trial court instructed the jury not to consider that defense in reaching a verdict on the murder charge. Perhaps some murder defendants are lucky enough to have individuals on their jury who are sufficiently versed in the law (or sufficiently cavalier about their responsibility as jurors) to ignore the literal terms of the instructions and to consider the issue of sudden and intense passion as a defense to murder.[16] Making Kevin Taylor's right to have

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[16] The law presumes, of course, that the jury followed the instructions. See *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987). As the Seventh Circuit explained in *Falconer*, 905 F.2d at 1136-1137:

> If read to a jury composed of lawyers, this set of instructions probably could not produce the faulty hypothetical murder verdict complained of since the elements of voluntary manslaughter were stated. But the reasoning that could produce such a faulty verdict by a lay jury was unmistakably left open in instructions given by the presiding judge at trial. We must presume that the jury was not already schooled in distinctions between murder, voluntary manslaughter, and justifiable self-defense – or even the general concept of lesser-included offenses.

his defense considered dependent on that kind of fortuity is the epitome of a procedure which makes an individual's liberty turn on wholly arbitrary circumstances. Certainly, no one can say that a process which precludes a defendant from having his valid defense to a murder charge considered comports with the "fundamental notions of fairness" that define due process of law. *Chaffin* v. *Synchcombe*, 412 U.S. 17, 25 (1973).[17]

The Seventh Circuit recognized that a defendant may not secure habeas corpus relief simply because the instructions that were given at his state trial were "undesirable, erroneous, or even universally condemned." *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). See Pet. App. 20; *Falconer*, 905 F.2d at 1135. Nor is a defendant entitled to have a federal court substitute its judgment for a state

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[17] Although the right to be free from wholly arbitrary deprivations of liberty is necessarily a general one, its generality does not mean that every routine application of the standard to differing fact patterns qualifies as a new rule under *Teague*. As Justice Kennedy observed recently:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that these applications themselves create a new rule. * * * Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result too novel that it forges a new rule, one not dictated by precedent.

Wright v. *West*, 112 S. Ct. 2482, 2499 (1992) (Kennedy, J., concurring). If reasonable jurists would all agree (on the date that the conviction became final) that the proceeding violated the Due Process Clause, the State has no legitimate reliance interest deserving of protection under *Teague*. It is not essential that all reasonable jurists agree on a precise articulation of the right in question.

court determination that the defendant failed to present enough evidence to support the requested defense instruction. See *Peery*, 615 F.2d at 404. What a habeas corpus petitioner is entitled to, however, is a federal determination of whether his right to present a defense has been arbitrarily foreclosed in a manner that amounts to a "complete miscarriage of justice [or] an omission inconsistent with rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962).[18]

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[18] The instructional error in this case was particularly severe because of the nature of the defense that Kevin Taylor presented. This was not a case in which the defendant's proposed instruction merely served to accentuate the defendant's attack on the prosecution's case-in-chief. This was not, for example, a defendant asking for an "alibi instruction" as part of an effort to rebut the state's claim that the defendant committed the criminal act. (An alibi instruction informs the jury that, in order to gain an acquittal, the defendant need not prove an alibi defense but need only raise a reasonable doubt as to his or her presence at the scene of the crime. See *United States* v. *Burse*, 531 F.2d 1151, 1153 (1976)). In that type of case, even if the defendant's proposed instruction is omitted, the jury is still told that it has to find that the defendant committed the criminal act. The proposed alibi instruction can be treated as somewhat superfluous, therefore, because the jury instructions, taken as a whole, require the jury to find the relevant element. See *Jones* v. *Kemp*, 794 F.2d 1536, 1540-1541 (11th Cir.) (the trial court "gave proper instructions on the elements of the crime and burden of proof, and Jones has demonstrated no prejudice from the absence of a specific alibi instruction"), cert. denied, 479 U.S. 965 (1986).

Here, by contrast, the missing instruction about Kevin Taylor's defense to the murder charge was not at all superfluous. In the absence of a jury charge that sudden and intense passion constitutes a defense to murder, the issue of whether Taylor had acted under sudden and intense passion would never have been considered by the jury as part of the murder charge. Taken as a whole, the instructions on murder amounted to a grievous "mis-

It is evident, then, that on August 3, 1987 – the date on which Kevin Taylor's conviction became final – it was a clearly established rule that a defendant who presents sufficient evidence to support a relevant defense has a fundamental constitutional right to present evidence relating to that defense and to have it considered by the trier of fact. No reasonable interpretation of precedent could have led to any other conclusion and the Seventh Circuit broke no new ground in recognizing the precept. See *Stringer*, 112 S. Ct. at 1140; *Butler*, 494 U.S. at 415. The question to be asked is not whether the Seventh Circuit's decisions in *Falconer* and in this case were the first *applications* of these rules to the particular murder and voluntary manslaughter instructions at issue here.[19] Whether or not the instructions at issue here were routinely applied in Illinois is not relevant. See *Penry*, 492 U.S. 302 (1989). The question is whether the Seventh Circuit relied upon any new legal principles that would not have been considered "by a state court considering petitioner's claim at the time his conviction became final." *Sawyer* v. *Smith*, 497 U.S. 227, 237 (1990). Clearly, it did not.

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statement of the law" as they totally negated the concededly relevant defenses to murder. *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977).

[19] It was this misguided approach to the *Teague* inquiry that led the District Court to rule that Taylor was seeking to invoke a new rule. The court recognized that Taylor was not invoking any new legal principles, but the court was nonetheless moved by the fact that these principles had not yet been applied to the Illinois jury instructions by the time Taylor's conviction became final. Pet. App. 31-32.

2. The Well-Established Right To Have One's Defense Considered Has Nothing To Do With Any Open Questions Relating To A Defendant's Right To A Lesser Included Offense Instruction.

Throughout its brief, the State has sought to create an impression of uncertainty in the law by conflating the well-established right to present a relevant defense with the very different question of whether a defendant in a non-capital state case is constitutionally entitled to have his jury instructed on a lesser included offense. See Petr's Br. i, 17, 25, 27. The due process right that the Seventh Circuit relied upon, however, has nothing to do with any purported right to instructions on lesser included offenses.

When a state court denies a defendant a lesser included offense instruction it is, in no way, limiting the defendant's ability to present his defense to the crime with which he was charged. With or without the lesser included offense instruction, the defendant is given every opportunity to persuade the jury and the jury has every opportunity to decide that the defendant is not guilty of the elements of the offense or has an affirmative defense to the charged crime. The defendant seeking a lesser included offense instruction thus wants more than the opportunity to prove that he is innocent of the crime charged. Namely, he wants the jury to be given "a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Beck* v. *Alabama*, 447 U.S. 625, 633 (1980). In *Beck*, the Court held that a defendant in a capital case is entitled to such an instruction. This Court has never squarely decided, however, whether a defendant is constitutionally entitled to this sort of instruction in a non-capital case (see *id.* at 638 n.14), and

this question has been the subject of some disagreement among the courts of appeals. See Petr's Br. 17 n.7.

Kevin Taylor is not claiming that his jury should have been given "less drastic alternatives" so that he might have had a better practical chance of securing an acquittal. Rather, he is asking for the core right to try to convince the jury that he is innocent of murder. As the State recognizes at many points in its brief, this is a case about an opportunity to present an affirmative defense to murder and to have that defense considered – not about a right to force the State to charge a defendant with manslaughter. See, *e.g.*, Petr's Br. 12 (conceding that instructions permitted "jury to find Taylor guilty of murder without considering his affirmative defense"); *id.* at 16 (claiming that "a state has no constitutional obligation to permit defendants to plead and prove affirmative defenses"); *id.* at 19-20 (instructional error here "potentially removed an affirmative defense from the jury's consideration"); *id.* at 23 ("an accused has no constitutional right to an affirmative defense instruction"). The uncertainty about the applicability of *Beck* to non-capital cases casts no clouds on the clarity of the basic right to present a defense that Taylor is asserting.

3. The Error Here Severely Lessened The Likelihood Of An Accurate Conviction And Therefore Qualifies Under The Second *Teague* Exception.

Given the nature and severity of the constitutional violation here – it totally deprived Kevin Taylor of his right to defend himself against the State's murder charge – this case qualifies under the second exception to *Teague*. Thus, even if this Court were to conclude that the Seventh Circuit somehow relied on a new rule of law, Kevin Taylor would still be entitled to habeas corpus relief.

In *Teague*, the plurality held that even new rules must be applied retroactively when they involve "procedures without which the likelihood of an accurate conviction is severely diminished." 489 U.S. at 313. This exception is designed to cover new rules of criminal procedure "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495. The right to present a defense – be it an attack on an element or an affirmative defense – surely qualifies under these standards.

Of course, as Justice O'Connor noted in *Teague*, "[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." 489 U.S. at 313. This observation is surely accurate and fortifies Kevin Taylor's claim that his plea for basic due process is not predicated on any new rule of law. However, in the event that the Court concludes that Taylor is seeking the benefit of some new rule, it should recognize the right to present a defense as a procedure "without which the likelihood of an accurate conviction is severely diminished." *Teague*, 489 U.S. at 313. In either case, Taylor is entitled to relief.

II. THE STATE'S CLAIM THAT THE DUE PROCESS CLAUSE HAS NO BEARING ON AFFIRMATIVE DEFENSES IS PLAINLY WRONG.

The State cannot defend the accuracy or the fairness of the jury instructions in this case, and it has not attempted to do so. Indeed, the State concedes that Taylor's instructions contravened Illinois law on murder and voluntary manslaughter by "permitting the jury to find Taylor guilty of murder without considering his affirmative defense." Petr's Br. 12. Nonetheless, the State claims

that Kevin Taylor's constitutional rights were not violated because, the State asserts, the fairness of the manner in which states adjudicate affirmative defenses is not subject to "scrutiny under the Due Process Clause." *Id.* at 16. According to the State, state procedures relating to affirmative defenses – no matter how unfair and no matter how arbitrary – do "not implicate the Due Process Clause because a state has no constitutional obligation to permit defendants to plead and prove affirmative defenses like manslaughter in the first place." *Id.* The State's rather startling contention that the Due Process Clause has nothing to say about affirmative defenses is plainly wrong.

The State's argument relies wholly upon the "bitter with the sweet" rationale which this Court has rejected time and again. The State contends that Kevin Taylor must take the bitter – a proceeding in which he had no right to have the jury consider his factually supported defense – with the sweet – Illinois' willingness to create an affirmative defense that it was not constitutionally compelled to recognize. As Justice White wrote for the Court, however, in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 541 (1985):

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. *If a clearer holding is needed, we provide it today.* The point is straightforward: the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology.

(emphasis added). See also *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Vitek* v. *Jones*, 445 U.S. 480, 491 (1980).

The Court's strong proclamation in *Loudermill* is directly controlling here. Illinois may not have had to create any affirmative defenses to murder, but once it did, it created a liberty interest that the Constitution most assuredly protects.[20] Under Illinois law, any person who is guilty of murder can be sentenced to up to forty years in prison. Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(1)(a) (1985).[21] If the person acted under a sudden and intense passion, however, he is not guilty of murder and can be sentenced to a maximum of fifteen years. Ill. Rev. Stat. ch. 38,

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[20] The State argues that "[i]t would make little sense to reason that the Due Process Clause permits states to abolish the manslaughter affirmative defense altogether, * * * but still hold that when a state nonetheless permits a jury to consider manslaughter, the Due Process Clause requires that it do so with accurate instructions." Petr's Br. 18. As the Court suggested in *Logan*, however, this result is not at all anomalous. When a legislature seeks to create general legal rules (such as enacting a murder statute with no affirmative defenses), the *legislative process* "provides all the process that is due." *Logan*, 455 U.S. at 433 (citing *Bi-Metallic Investment Co.* v. *State Bd. of Equalization*, 239 U.S. 441, 445-446 (1915)). This legislative process provides significant protection of individual rights because the legislature will, in many cases, find it politically impossible to enact a measure that it may constitutionally be allowed to enact (such as a murder statute with no affirmative defenses). On the other hand, when the legislature has created a general rule creating an entitlement (such as an affirmative defense to a murder statute), the Due Process Clause requires that each individual be given a fair opportunity to prove his eligibility for that right.

[21] If aggravating circumstances are present, the individual can be sentenced to an extended term, natural life, or death. See generally Ill. Rev. Stat. ch. 38, ¶ 1005-8-1 (1985); Ill. Rev. Stat. ch. 38, ¶ 9-1 *et seq.* (1985).

¶ 1005-8-1(a)(4) (1985). Although the state has the option of not creating this significant liberty interest, "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Loudermill*, 470 U.S. at 541.

Hicks v. *Oklahoma*, 447 U.S. 343 (1980), applies this principle in the setting of a criminal trial. In *Hicks*, the State of Oklahoma made the same argument that Illinois makes today. Oklahoma argued that because it was under no constitutional duty to require jury sentencing, depriving a defendant of his right to jury sentencing was denying him a "right of exclusively state concern." *Id.* at 346. The Court rejected this argument forcefully. Once Oklahoma chose to create a right to jury sentencing, the Court explained, it created a "substantial and legitimate expectation" that a defendant "will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.* "[T]hat liberty interest", the Court concluded, "is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Id.*[22]

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[22] Justice Scalia's observation in *McKoy* v. *North Carolina*, 494 U.S. 433, 459-460 n.1 (1990), suggests that the position the State is taking here is so out of step with this Court's decisions that it is "implausible that [the Court] would entertain it on its merits." As he explained:

> *Whether or not* Maryland law could constitutionally require unanimity [by a jury in finding mitigating factors in a capital sentencing], the Court of Appeals authoritatively determined that it did not do so; and a death sentence based on an erroneous instruction to that effect would have to be set aside. * * * [Instructions] violate the Due Process Clause if they misstate the law to the defendant's detriment – and it is not essential to that violation that the law as misstated be an unconstitutional law. Thus, to take the most extreme example, if state law, as authoritatively interpreted by the State's Supreme Court, does not authorize the death penalty for a certain offense, the Due Process Clause would not permit a state trial court to impose it. * * * See *Hicks* v. *Oklahoma* * * * (where state law requires jury sentencing, state courts may not enforce sentence not imposed by jury).

(dissenting opinion) (emphasis in original).

In addition, quite aside from the liberty interest created by state law, Kevin Taylor had a natural liberty interest in his freedom from incarceration. See *Vitek*, 445 U.S. at 491-494; *Morrissey* v. *Brewer*, 408 U.S. 471, 480-484 (1972). Twenty years of his life depended on his opportunity to present his case to the jury and he clearly suffered "grievous loss" by virtue of the grossly unfair procedure through which he was deprived of that opportunity. *Morrissey*, 408 U.S. at 481 (quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

The State ignores these long lines of cases and seeks to rely instead on this Court's decision in *Patterson* v. *New York*, 432 U.S. 197 (1977), and its progeny, to support the contention that the Due Process Clause has nothing to say about the manner in which states adjudicate affirmative defenses.[23] The State's reading of *Patterson* is patently specious.

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[23] The logic of the State's "bitter with the sweet" argument necessarily would immunize even the adjudication of elements from due process scrutiny unless the element is one that the state is somehow constitutionally compelled to include within its definition of a crime. This is basically the reform urged by Judge Easterbrook's concurring opinion in *Flowers*, 962 F.2d at 707-712, in which he followed *Falconer* and *Taylor*, but expressed some reservations about their rationale. Contrary to the State's claim, however, Judge Easterbrook's position reflects no uncertainty in the settled law as of 1987.

The issue before the Court in *Patterson* was not *whether* the Due Process Clause applies to affirmative defenses, but rather *which* procedural protections the Due Process Clause requires with respect to the adjudication of affirmative defenses. In *In re Winship*, 397 U.S. 358

Consistent with the view he first expressed in *Cole* v. *Young*, 817 F.2d 412, 435-444 (7th Cir 1987) (Easterbrook, J., dissenting), Judge Easterbrook proposed a new way of analyzing due process attacks on state convictions. As he put it in *Flowers*: "I offer a suggestion." 962 F.2d at 711. The suggestion that he offered, however, amounts to a rather radical transformation of this Court's due process jurisprudence as it would ignore state law definitions of crimes altogether and ask only whether the Federal Constitution would allow the state to define the crime without the element or the defense upon which the habeas corpus attack focuses. As we have explained, and as Judge Easterbrook concedes, this approach is inconsistent with the settled law in this area. See *Cole*, 817 F.2d at 438 (discussing this Court's holdings and commenting that "[a] regime that makes substance turn on nomenclature has little to recommend it"). See generally Frank Easterbrook, *Substance and Due Process*, 1982 **Sup. Ct. Rev.** 85, 85 (arguing that "[a] Court that protects the legislative power to define substantive entitlements ought to give it control of process as well").

Concurrences and dissents serve important purposes when they advocate major theoretical reassessments of settled legal principles. They do not, however, demonstrate uncertainty in the settled law or show that reasonable jurists differ in interpreting the dictates of settled law. In any event, even if Judge Easterbrook did disagree with the conventional reading of this Court's precedents that we have discussed, that fact would not be determinative of whether the Seventh Circuit's decision here was reasonably compelled by precedent. See *Stringer*, 112 S. Ct. at 1140 (1992) (the fact that Fifth Circuit did not believe that the result was compelled by precedent was not dispositive; "[t]he short answer * * * is that the Fifth Circuit made a serious mistake."); *Penry*, 492 U.S. at 314-319 (holding that petitioner was not relying on new rule even though four Justices dissented on the merits of his claim).

(1970), the Court had held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. And in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the Court had held that this burden of proof requirement extends to every element of a criminal offense. These holdings did not, however, necessarily impose the same requirement with respect to the prosecution's efforts to negate an affirmative defense. The Court had often recognized that "due process is flexible and calls for such procedural protection as the particular situation demands" (*Morrissey*, 408 U.S. at 481), and the Court's task in *Patterson* was to decide exactly *how much process is due* with respect to affirmative defenses. In answering that question the Court never came close to holding that the Due Process Clause has no application to affirmative defenses; rather the Court applied due process analysis to New York's method of dealing with affirmative defenses and concluded that due process was satisfied.

Indeed, far from holding that state adjudications of affirmative defenses are immune from due process scrutiny, the Court in *Patterson* went to pains to point out that New York had fairly administered the affirmative defense in a way that satisfied the dictates of the Due Process Clause. The Court explained that "[h]ere, *the jury was instructed in accordance with the statute* * * * . [C]learly the evidence failed to convince the jury that Patterson's affirmative defense had been made out." 432 U.S. at 206 (emphasis added). Similarly, in *Martin* v. *Ohio*, 480 U.S. 228 (1987), the Court reaffirmed *Patterson*'s holding with respect to the state's not having to carry the burden of proof in negating self-defense, but the Court stressed once again that the defendant "*had the opportunity under state law and the instructions given* to justify the killing and

show herself to be blameless by proving that she acted in self-defense." *Id.* at 233 (emphasis added).

It is clear, then, that *Patterson* and its progeny actually support the claim upon which the Seventh Circuit granted habeas corpus relief. The Seventh Circuit followed *Patterson* and its progeny faithfully when it held that *Patterson* forecloses any argument that Taylor was constitutionally entitled to have the State bear the burden of disproving his affirmative defense.[24] Pet. App. 12-16. The Court was just as faithful to *Patterson*, however, when it held that *Patterson* does not undermine Taylor's claim that he had the right to have a fair opportunity to be heard on his affirmative defense. See generally Ronald J. Allen, *The Restoration of In Re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 **Mich. L. Rev.** 30, 45 n.60 (1977) (explaining that *Patterson* does not immunize affirmative defenses from constitutional scrutiny). As the Seventh Circuit had earlier held in *Falconer*:

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[24] As part of its effort to portray disagreement among lower courts prior to the Seventh Circuit's decision, the State repeatedly confuses the state-law burden of proof issue that was the primary basis of *People* v. *Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), with the federal due process principle that the Seventh Circuit relied upon. The State asserts, for example, that "[s]ince *Reddick*, federal and state courts, including the Seventh Circuit as well as the Illinois Supreme Court, have issued markedly inconsistent opinions as to whether *Reddick* errors violate the Due Process Clause." Petr's Br. 28; see generally *id.* at 28-30. As the Seventh Circuit made clear, however, it was *not* basing its relief on the burden of proof error identified in *Reddick* because it concluded that *Reddick* was not a constitutional decision. Any debate about the constitutional status of *Reddick* is, therefore, of absolutely no significance to this case. Taylor's action depends on his right to have the jury consider his defense – not on the question of who must bear the burden of proving or disproving it.

> The State misinterprets the petitioner's argument when it cites United States Supreme Court precedent for the proposition that, as a matter of constitutional law, the burden of proof as to an affirmative defense may be placed on either the defendant or the state. This case does not turn upon the presumption and burden of proof questions as were presented in such cases as *Mullaney*, * * * *Patterson*, * * * or *Martin* * * * . The hardship for the petitioner in this case is that even though the judge properly decided that the jury should consider a verdict of voluntary manslaughter, the jury may have been left with the false impression that it could convict the petitioner of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction. No matter which side carried the burden of proof on any particular element or defense, there can be no question that a murder verdict would have been improper if the jury had found one of the mitigating mental states.

Falconer, 905 F.2d at 1136.

The State's discussion of *Engle* v. *Isaac*, 456 U.S. 107 (1982), is plagued by this same basic confusion between the question of whether the Due Process Clause applies and the very different question of how much process is due. See Petr's Br. 18. In *Engle*, this Court simply reaffirmed *Patterson*'s holding that "the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime." 456 U.S. at 120. Therefore, the Court held, because absence of self-defense was not an element of the crime of murder in Ohio, the Due Process Clause of the United States Constitution did not require the state to prove absence of self-defense beyond a reasonable doubt.

In so holding, *Engle* ruled that Ohio could statutorily take upon itself the procedural burden of proving absence of self-defense beyond a reasonable doubt without transforming any violation of that state procedural law into a violation of due process. *Engle*, 456 U.S. at 121. This conclusion flows directly from the substance-procedure distinction that provides the foundation of this Court's due process jurisprudence. The first part of the due process inquiry often looks to *substantive* state law to determine whether an entitlement has been created which constitutes a protected liberty or property interest. If the court finds such a *substantive* interest (either one created by state law or a natural liberty interest), then the second part of the due process inquiry looks to the Federal Constitution to determine what kinds of *procedural protections* are constitutionally required in that specific context. The level of constitutionally required procedures is determined independently of state law. Thus, just as the fact that a state has chosen to provide *less* procedural protection than the Constitution requires does not affect the constitutional inquiry (see *supra* pp. 40-43), the fact that a state has chosen to provide *more* procedural protection than the Constitution requires does not transform those additional devices into constitutionally compelled procedures.[25] In this case, of course, Kevin Taylor is not

[25] The six Court of Appeals decisions that the State cites (Petr's Br. 25-27) involve this principle – that state procedural rules are not automatically elevated to requirements of due process – and do not in any way establish that the applicability of the Due Process Clause to affirmative defenses was "susceptible to debate among reasonable minds." Petr's Br. 25 (quoting *Butler*, 494 U.S. at 415). These cases simply apply *Patterson* and *Engle* to hold that a defendant's due process rights are not violated by state violations of their own *procedures*. See *Smart* v. *Leeke*, 873 F.2d 1558, 1564-1565 (4th Cir.) (habeas corpus petitioner argued that state must bear burden of disproving self-defense beyond a reasonable doubt), cert. denied, 493 U.S. 867 (1989); *Allen* v. *Redman*, 858 F.2d 1194, 1200 (6th Cir. 1988) (habeas corpus petitioner sought to rely on state procedural rule to require state to negate affirmative defense); *Walker* v. *Endell*, 850 F.2d 470, 476 (9th Cir. 1987) (habeas corpus petitioner sought to rely on state procedural rule to require state to negate affirmative defense), cert. denied, 488 U.S. 926 (1988); *Willard* v. *California*, 812 F.2d 461, 463 (9th Cir. 1987) (habeas corpus petitioner sought to rely on state procedural requirement to support contention that he was entitled to have his jury charged with a more specific instruction than the one his jury received); *Knaubert* v. *Goldsmith*, 791 F.2d 722, 725-726 (9th Cir.) (habeas corpus petitioner sought to rely on state procedural rule regarding instructions designed to place the burden on the state to prove sanity beyond a reasonable doubt), cert. denied, 479 U.S. 867 (1986); *Wood* v. *Marshall*, 790 F.2d 548, 551-552 (6th Cir. 1986) (habeas corpus petitioner sought to rely on state procedural rule to require state to negate affirmative defense), cert. denied, 479 U.S. 1036 (1987).

relying on the presence of any state *procedural* protection as the predicate of his liberty interest. He is relying on the very *substantive* entitlement to a sudden and intense passion defense.

There is no support, then, either in this Court's decisions or in lower courts' decisions, for the proposition that proceedings relating to affirmative defenses are beyond due process review. Nor is such a position tenable. Under the State's theory, the Due Process Clause would have nothing to say about a state proceeding in which a defendant was barred from testifying about an affirmative defense, barred from presenting witnesses about an affirmative defense, barred from having the assistance of counsel with respect to an affirmative defense, barred from confronting witnesses who refute an affirmative defense, or otherwise deprived of recognized constitutional rights with regard to the adjudication of an

affirmative defense. For, after all, those rights are made applicable against the states only through the Due Process Clause of the Fourteenth Amendment. The State's position is utterly inconsistent with the central guarantee of the majestic Due Process Clause in this area: "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington* v. *Texas*, 388 U.S. at 19.

CONCLUSION

For the above stated reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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